MAR 7 1942

Supreme Court of the United States

OCTOBER TERM 1941

No. 929

NORMAN WILLIAMS, Petitioner

versus

R. H. LAWRENCE, Superintendent,
Georgia State Penitentiary,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF RESPONDENT

ELLIS ARNALL,
Attorney General,
State of Georgia.

E. L. REAGAN,
Assistant Attorney General,
State of Georgia.

R. HOWARD GORDON,
Solicitor General, Northern
Judicial Circuit of Georgia.

Counsel for Respondent.

INDEX

	Page
Certificate of Service	42
Response to Questions Presented:	
Question No. I	3–22
Question No. II	22–28
Statement of Facts	28–31
Discussing Contradistinction of Cases Cited by Petitioner	31–36
Habeas Corpus Improper Remedy	36–38
Failure of Defendant's Counsel to Present Witnesses	38–40
Conclusion	40–41

CASES CITED

Williams v. Lawrence, Supt. Supreme Court of Georgia, 193 Ga....., January 13, 1942. Judgment under review	2–3
Williams v. State, 186 Ga. 251, 261, (Appeal for new trial)	7 and 26
Williams v. State, 187 Ga. 415 (Motion to set aside sentence)	29
Aldredge, Sheriff, v. Williams, 188 Ga. 607 (Habeas corpus)	24–28
Williams v. State, 192 Ga. 247, 258 (Extraordinary Motion for a New Trial)	5–22
Norman Williams v. J. C. Aldredge, Sheriff of Fulton County, 84 Law Ed. 586	23
Powell v. Alabama, 287 U. S. 45	31
Johnson v. Zerbst, 304 U. S. 458	32
Glasser v. United States, Sup. Ct. L. Ed. Volume 86, page 406	33
Minn. v. Brundage, 180 U. S. 499	34
Salinger v. Loisel, 265 U. S. 230	34–35
Wong Doo v. United States, 265 U. S. 239	35–36

Smith v. Milton, 149 Ga. 28 36
Anderson v. Treat, 172 U. S. 24, 19 Sup. Ct. 67 36
In Re Swann, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. ed. 1207 36
Etheridge v. Boston, 176 Ga. 388 36
Leo M. Frank v. C. Wheeler Mangum, Respondent, 237 U. S. 308, 59 L. Ed. 969 36–37
Frank v. State, 142 Ga. 741 37–38

STATUTES CITED

Section 1, 14th Amendment, United States Constitution 3
Section 27-2201, Code of Georgia 38
Section 70-208, Code of Georgia 39–40
Section 70-303, Code of Georgia 40

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 929

NORMAN WILLIAMS,

Petitioner,

versus

R. H. LAWRENCE, Superintendent, Georgia State Penitentiary,

Respondent.

RESPONSE OF R. H. LAWRENCE, SUPERINTENDENT OF GEORGIA STATE PENITENTIARY, TO THE PETITION OF NORMAN WILLIAMS FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

Respondent herein R. H. Lawrence, Superintendent, by his counsel herewith presents his objections to the issuance of a writ of certiorari to review of

final judgment of the Supreme Court of Georgia entered in the above stated cause on the 13th day of January, 1942, affirming the judgment of the City Court of Reidsville, Reidsville, Georgia. Reported in

193 Ga. ,

and holding in effect:

"Williams v. Lawrence, Superintendent.

"I. REID, Chief Justice:

"A defendant who, as in the presént case, instituted a petition for habeas corpus on ground that he had been deprived of the benefit of counsel as guaranteed him under the Constitution (Code Section 2-105), in that he did not receive proper representation by counsel appointed for him by the Court, which was dismissed on demurrer, in accordance with the decision of the Court on writ of error, that the facts alleged did not disclose a violation of the defendant's constitutional right to be represented by counsel, is precluded, by such judgment, (Aldredge v. Williams, 188 Ga. 607), from maintaining another petition for habeas corpus, based on the same ground. Perry v. McLendon, 62 Ga. 598; Day v. Smith, 172 Ga. 467, 474 (157 S.E. 639).

"2. In addition to former petition for habeas corpus, the defendant thereafter filed an extraordinary motion for new trial, wherein he presented the same contention that he had been deprived of the benefit of counsel; and the judgment of the Court denying this motion was,

after a careful review of the facts, affirmed by this Court. Williams v. State, 192 Ga. 247 (15 S.E. 2d 219).

"Thus, there have been in fact two adjudications against the defendant on the question he now seeks to present.

"There should be no further investigation. The judge did not err in dismissing the petition.

"Judgment affirmed.

"All the Justices concur.

January 13, 1942."

QUESTIONS PRESENTED.

1. The first question presented as to whether or not the accused, Norman Williams, was deprived of his liberty and life without due process of law, as guaranteed under Section I of the Fourteenth Amendment to the Federal Constitution, the contention being made that he had no education and was without legal skill or knowledge, and was financially unable to employ counsel, and that he was placed on trial for his life under an indictment for murder where the State court failed to make an effective appointment of counsel to represent him, where appointed counsel utterly disregarded their duty towards the accused, and failed to provide proper defense for him, and thus permitted his conviction through their failure to represent him; and

where they failed to prosecute a motion for a new trial after conviction, and where appointed counsel appeared before the Governor in opposition to clemency, and where one of said appointed counsel admitted on the clemency hearing that if he had been paid a fee, he would have made a motion for a new trial; and where one of said appointed counsel actually signed a petition against clemency, etc.

Respondent's reply to these contentions, as contained in question one, is that accused was not deprived of his liberty and life without due process of law, and as guaranteed unto him under the Federal Constitution, and that the Court did appoint two capable and competent counsel to represent him, and that they did represent him, and that under the circumstances and with the information they had made a very capable defense for him, and that all of said matters have been determined adversely to the petitioner in this case, in that the petitioner filed an extraordinary motion for a new trial before the Judge of the Superior Court of Elbert County where he was convicted, and where the same counsel appeared for him and raised the identical points that they are now raising in question one, and where the Trial Judge passed on all issues of law and fact and denied said extraordinary motion for a new trial, and from which decision the petitioner and his counsel carried the case to the Supreme Court of Georgia, and the Supreme Court decided the case adversely to petitioner on May 19, 1941, and the Court held that the evidence did not demand a finding that the accused had been denied the benefit

of counsel or due process of law as contended, nor does it otherwise appear that the presiding judge abused his discretion in denying the motion. This decision is reported in Georgia Reports, Williams vs. the State, Volume 192, beginning with page 247 and ending with page 258, and special attention is directed to the decision by presiding Justice Bell. In which decision Justice Bell discusses in detail every issue that is attempted to be raised in the petition for certiorari in this case, and discusses in detail every fact that is contained in question one presented in the petition for certiorari. And in one particular emphasized the fact that the appointed counsel did not testify, "that if he had been paid a fee he would have filed a motion for new trial," as is quoted by petitioner, but on the contrary testified that "had he been representing Williams and paid a fee for purpose of gaining time, he would have prosecuted the motion." The decision is as follows:

"WILLIAMS v. THE STATE

The defendant was convicted of murder, and after affirmance of a judgment overruling an ordinary motion for new trial, and after still other proceedings, he filed an extraordinary motion for a new trial, presenting, among others, the contention that appointed counsel who represented him during the trial had so failed in their duty to him as attorneys that he had been deprived of the benefit of counsel and denied due process of law. The judge, after hearing evidence both for and against the motion, found the issues of fact against the movant,

and denied the motion on all grounds. Held, that the evidence did not demand a finding that the accused had been denied the benefit of counsel or due process of law, as contended; nor does it otherwise appear that the judge abused his discretion in denying the motion.

No. 13572. May 19, 1941.

Murder. Before Judge Edwards. Elbert superior court. September 28, 1940.

The exception is to a judgment denying an extraordinary motion for a new trial. The following facts appeared:

At the September term, 1937, of the superior court of Elbert County, Norman Williams was indicted for the offense of murder in the alleged killing of Lon Fortson by shooting him with a pistol, the date of the alleged offense being July 19, 1937. On the morning of September 13, 1937, two attorneys of the Elberton bar were appointed to represent the accused, he being unable to employ counsel. His trial began on Thursday afternoon, September 16, and continued until Saturday afternoon following, when the case was finally submitted to the jury. The following Monday morning the jury returned a verdict finding the defendant guilty of murder as charged. The verdict contained no recommendation, and sentence of death was imposed. Appointed counsel filed a motion for new trial, but later withdrew from the case after another attorney was

employed. The employed attorney prepared an amendment to the motion and prosecuted it to final determination; and a judgment overruling the motion was affirmed by this court. Williams v. State, 186 Ga. 251 (197 S. E. 838). After the defendant was resentenced, the same employed attorney filed a motion to set aside the new sentence, because of alleged disqualification of the then presiding judge, and for other reasons not relating to the verdict. This motion was overruled, and again the judgment was affirmed. Williams v. State, 187 Ga. 415 (1 S. E. 2d, 27). Later, the present attorney was employed. He instituted in behalf of the defendant and against the sheriff of Fulton County, where the defendant was then incarcerated, a petition for the writ of habeas corpus, alleging that the conviction was void for the reason that the accused had been denied the benefit of counsel and due process. The trial judge overruled a demurrer, and the respondent sheriff excepted; and this judgment was reversed. Aldredge v. Williams, 188 Ga. 607 (4 S. E. 2d, 469).

On March 11, 1940, during the March term of the superior court of Elbert County, Williams, through the same attorney who had represented him in the habeas-corpus case, presented to the judge an extraordinary motion for new trial, in which he gave a history of his case and referred to all the foregoing decisions. It appears that the first motion for new trial, as filed during the term of his conviction, was overruled on December 6, 1937. In the present extraordinary motion the movant presented, among others, the same contentions as were made in

the habeas-corpus case, to wit: that by reason of certain alleged facts he had been denied (1) due process of law, as guaranteed by the fourteenth amendment of the Federal constitution (Code, Sec. 1-815), and (2) the benefit of counsel, as provided in the constitution of the State (Sec. 2-105). After hearing evidence both from movant and respondent, the judge overruled the motion, and the movant excepted. In such extraordinary motion for a new trial, as amended, substantially the following allegations were made:

Movant was indicted for the killing of Lon Fortson. Movant being at that time about twenty-three years of age, and being unable to read or write or to employ counsel, and without friends or family who were able to secure counsel for him, the trial judge appointed two named attorneys to represent him on his trial. Said counsel made no preparation for the trial of his case, made no motion for a continuance in order to have time to prepare the case, and allowed movant to be placed on trial for his life after only one conference with him. Movant was not guilty of the offense charged against him, and had six or seven witnesses whose testimony, if believed by the jury, would have resulted in movant's acquittal. Said appointed counsel, although furnished with the names of said witnesses, called none of them to the witness stand and offered only the unsworn statement of movant in his defense. Had said witnesses been offered by said counsel, they would have given substantially the same testimony as embodied in their affidavits attached hereto, to wit, that said witnesses would have sworn be-

fore the trial court, in substance, that movant shot said Fortson in self-defense; that said Fortson and his son were both armed and advancing upon movant; that movant did his best to escape, but the deceased approached from one direction while the son of the deceased approached from the opposite direction, thus entrapping movant, who was endeavoring to escape by running back and forth through a small tenant-house. That the evidence of said witnesses would have been invaluable to his defense, in view of the fact that the State was contending that neither the deceased nor his son was armed, and offered evidence to this effect, when as a matter of fact both the deceased and his son were armed and advancing upon movant in a threatening and menacing manner. That during the trial two named witnesses for the State were allowed to make certain statements (quoted in the motion) of a highly inflammatory and prejudicial nature against movant, to which his counsel interposed no objection, though had such testimony been objected to the court would have excluded same, and had said counsel made a motion based on the illegal and prejudicial evidence the court would under the law have been compelled to declare a mistrial. Appointed counsel thus allowed movant's rights to be totally and completely ignored, and permitted the jury to become prejudiced and influenced against him because of such illegal testimony. Said appointed counsel made no effort whatever to obtain a new trial after movant's conviction, although they did file a skeleton motion for a new trial based only upon the general grounds; and said appointed counsel refused to amend the motion for new trial, and

advised the trial judge that they would not argue the motion for a new trial or urge it upon the judge, and that insofar as they were concerned the court could dismiss the motion for a new trial. Said counsel also informed the court that if it did not dismiss the motion for a new trial, the court should strike the names of said counsel from the skeleton motion. That said appointed counsel, after abandoning the motion for new trial, and while other counsel were considering entering the case, directed a joint letter to such other counsel in an effort to discourage them from entering the case, and informed them that there was no merit in the motion for a new trial; that "We do not contemplate filing an amended motion, and we will be content to let the law take its course," and further, "We consider that we have done all that is required of us," and that "We will depend upon Williams to be in charge of his own case from now on so far as we are concerned."

Movant shows that when the jury in this case retired to consider their verdict, they were not properly sequestered, and were permitted to consider their verdict in a room in the court-house that was not private, for the reason that the door to said room was nearly one-half glass, and from the upper part of said door there was a large triangular hole in said glass, because of which the deliberations of the jury were not private, as by law required; and that said appointed attorneys, although fully informed as to said proper (improper) sequestration of the jury, failed and neglected to call the matter to the attention of the court, or to make any motion

of any kind, and thus permitted the jury to continue their deliberations under said circumstances. Movant shows that immediately after the jury had retired to said jury room to begin their deliberations, a spontaneous burst of applause arose from the spectators in the court-room, and that the spectators, some fifty or more in number, began celebrating by hilarity, loud talking, and by generally milling and moving about the court-room; and movant shows that the noise and confusion resulting from said demonstration, was very loud and profuse, so much so until said jury were disturbed in their deliberations, and that some member of said jury, whose name to movant is unknown, opened the door to said jury-room, so that said jury could discover the purpose of said demonstration on the part of the spectators, and that said demonstration continued in the presence of said jury until and after the door of said jury room had again been closed. That the hostility and feeling against him was very pronounced, and was obviously and clearly a demonstration against movant, which was highly prejudicial and inflammatory, having occurred as alleged in the presence of said jury, which movant alleges was calculated to and did as a matter of fact cause bias and prejudice in the minds of the jury against movant. "Movant shows that although the foregoing circumstances occurred before and during the trial as above set out, he did not know and had no way of knowing, until after the time for perfecting his motion for a new trial had elapsed, of the full extent of the failure of appointed counsel to provide for him the aid and assistance of counsel to which he was entitled. Movant did not know that

such counsel utterly lacked the energetic and effective devotion to his cause that they owed him until the subsequent acts and admissions of said counsel, hereafter recited, showed unmistakably the true nature and quality of the failure of said counsel was not due to neglect and error of judgment but to an utterly abandoned attitude towards the duty which they owed movant, . . . and to the court, to furnish him with effective and energetic aid in his defense. The subsequent acts and admissions of counsel which movant contends characterized their acts as furnishing only a pretense of a defense, rather than the assistance which movant was entitled to (are) as follows:"

When movant applied for a commutation of sentence by the Governor, one of said appointed counsel voluntarily appeared before the Governor and testified in opposition to clemency, and among other things swore before the Governor: "Had I been representing Williams and paid a fee, I would have prosecuted the motion" (for a new trial). One of said counsel testified before the Governor that there was evidence introduced in the trial to which he should have objected, and no objection was interposed. One of said counsel signed a formal petition opposing commutation of sentence of movant, and made the written statement: "I was appointed by the late Judge Moseley to represent this defendant . . . I feel that the man is guilty of murder, and I see no reason why his sentence which the courts have imposed should be interfered with by the Executive department." One of said counsel violated a privileged communication at the hearing

before the Governor, by swearing: "Norman Williams told me he thought they were trying to arrest him and he shot his way out."

"Movant shows that the utter failure of appointed counsel to prepare the defense, to move for continuance; to produce available witnesses on movant's behalf, to make even the most obvious objections to illegal, inflammatory, and prejudicial testimony offered by the State, to make a timely motion for a mistrial, to make an effective motion for a new trial, together with the consent of said counsel for the dismissal of the motion for new trial, under circumstances that show that such lack of defense was not due to inexperience or mistakes of judgment, but to a total failure to discharge their duty of providing energetic and effective representation, all point conclusively to the fact that movant's rights were utterly and completely ignored, and thus no effective representation was provided for him. Movant contends that his trial, conducted under the circumstances alleged, amounts to a denial of due process" under the fourteenth amendment of the constitution of the United States (Code, Sec. 1-185); and that the facts and circumstances of his trial, as stated, show that movant has been denied the privilege and benefit of counsel guaranteed under the constitution of Georgia (Code, Sec. 2-105).

The evidence for the movant included certain affidavits: one from movant himself, three from persons who deposed to circumstances tending to show self-defense, and one from the attorney who had been appointed as leading counsel; also letters, ex-

cerpts from testimony given by the appointed attorneys in a clemency hearing before the Governor, and other documents. The evidence for the respondent included affidavits from various officers, and jurors, other excerpts from evidence of the attorneys as delivered in said clemency hearing, and other documents. All of such evidence was admitted without objection. The order denying the motion expressly recited that the issues of fact were found against movant and in favor of respondent.

William S. Shelfer, for plaintiff in error.

Ellis G. Arnall, attorney-general, A. S. Skelton and R. Howard Gordon, solicitors-general, Duke Davis and C. E. Gregory, Jr., assistant attorneys-general, contra.

Bell, Justice. The extraordinary motion for new trial was not dismissed or otherwise disposed of on inspection of its allegations. On the contrary, the trial judge entertained it for the purpose of investigating the facts, and then, after hearing evidence on both sides, passed an order finding the issues of fact in favor of the respondent, and denying the motion. Thus, even if the allegations themselves should be treated as stating absolute cause for a new trial for the reason that the movant was denied the benefit of counsel and due process, or for other reason, still the case does not come to us as one to be decided as a matter of law on the pleadings, but the substantial question is whether the judge was authorized to find as he did on the evidence. The judge accepted responsibility as a

trior of the facts, and his findings thereon if supported by substantial evidence as conclusive. Loyd v. State, 151 Ga. 717 (108 S. E. 55). Putting aside for the moment the contention as to unfaithfulness and dereliction of duty on the part of the appointed attorneys, let us consider whether the evidence was such as to demand a new trial on extraordinary motion, in the interest of justice, but entirely apart from the constitutional right to the benefit of counsel. The happenings in the trial were of course known to the defendant, even what he alleged in regard to disorder in the court-room and disturbance of the jury. He shows this by the allegations in his motion. A motion for a new trial was filed by appointed counsel during the term at which the movant was convicted. Before the motion was heard, employed counsel presumably of movant's own choosing entered the case, filed an amendment complaining specially of various matters, and brought the case to the Supreme Court after such motion as amended was overruled by the trial judge. Moreover, the affidavit made by the movant in support of his present motion shows that all of the matters of which he now complains, so far as antecedent to the clemency hearing, were well known to him, or could have been discovered by him or his employed attorney, pending his original motion; or, to say the least, in so far as these matters were not embraced in the original motion, the judge hearing the instant motion was authorized to find that they could by proper diligence have been embodied therein. It does not appear that movant was unable for any reason to communicate freely with employed counsel, that he did not know

the contents of his original motion, or that he was to any extent ignorant or under any misapprehension as to his rights. No attack whatever is made upon the skill, diligence or faithfulness of such employed attorney. In the circumstances, any matter which could have been complained of in the original motion for new trial would not constitute ground for an extraordinary motion. Frank v. State, 142 Ga. 741 (3, 4) (83 S. E. 645); King v. State, 174 Ga. 432 (2) (163 S. E. 168). It is not only the law of Georgia, but is a generally accepted principle, that extraordinary motions for new trial can not be based upon matters that were known to the movant in time to have had them stated in his original motion, or that could have been discovered in time by proper diligence. Malone v. Hopkins, 49 Ga. 221; Toledo Scale Co. v. Computing Scale Co., 267 U. S. 399 (43 Sup. Ct. 458, 67 L. ed. 719); 46 C. J. 243, Sec. 216; 20 R. C. L. 289-291, Sec. 72. Manifestly, the judge was authorized to find that the evidence on which the movant now relies was not newly discovered; and more than this, he could have found that none of it was true, in view of the evidence of appointed counsel as to statements made to them at the trial, when they were seeking evidence favorable to the accused.

Coming now to the question whether the conduct of the trial by appointed counsel was such that the defendant really did not have the benefit of counsel and was thus deprived of a fundamental right in violation of the fourteenth amendment of the Federal constitution (Code, Sec. 1-815), and the guaranty of the constitution of Georgia (Sec. 2-

105), we will say first that apparently most of the matters of fact alleged in the extraordinary motion were set forth therein, more for the purpose of showing that the movant was actually deprived of the benefit of counsel, then with the intention of relying upon them as constituting within themselves sufficient basis for the motion. To relieve possible misapprehension, however, we have considered them from both viewpoints. In so far as the allegations or the evidence in reference to these matters may have tended to show that movant was deprived of the aid of counsel and thereby denied due process of law, or may have been made or offered for that purpose, we do not deem it necessary to consider whether diligence or lack of diligence on his part should have any bearing whatever on the present inquiry; for, with respect to such constitutional questions, we shall assume that they were presented in a proper manner and within sufficient time, regardless of the antecedent proceedings, or delay from whatever cause. Cf. Lowry v. Herndon, 182 Ga. 582 (186 S. E. 429); Herndon v. Lowry, 301 U. S. 242 (57 Sup. Ct. 732, 81 L. ed. 1066); Brown v. Mississippi, 297 U. S. 278, 312 (56 Sup. Ct. 461, 71 L. ed. 270). The trial judge apparently acted upon this assumption, and found on the evidence that the movant did have the benefit of counsel and was afforded due process within the meaning of the State and Federal constitutions.

As to the complaints against the manner in which the trial was conducted, the judge trying the present motion was, under the evidence, auhorized to

find as follows: (1) That notwithstanding the gravity of the alleged offense, no intricate questions of law or of fact were involved; that all witnesses were present or easily accessible; and that a motion for continuance, if made, would have been without merit. Code, Sec. 27-2002; Kelloy v. State, 151 Ga. 551 (107 S. E. 488); Harris v. State, 152 Ga. 193 (108 S. E. 777); Ivey v. State, 154 Ga. 63 (113 S. E. 175); Cannady v. State, 190 Ga. 227 (2) (9 S. E. 2d, 241). (2) That the failure of counsel to introduce the witnesses who it is now claimed would have testified to facts or circumstances indicating self-defense was due to the fact that on inquiry by counsel at the trial these same witnesses were reluctant and virtually disclaimed knowledge of any such facts or circumstances, and that in the situation presented counsel deemed it wise to rely on the defendant's statement and thus secure the concluding argument (Aldredge v. Williams, 188 Ga. 607, 609, 4 S. E. 2d, 469). (3) That, instead of conferring with the accused, only once and briefly, counsel conferred with him several times, and more or less thoroughly. (4) That the failure to object to the alleged illegal and prejudicial testimony was due either to a belief, whether mistaken or not, that objection would merely emphasize a prejudicial fact which the jury probably knew about already, or that failure to object was a mere oversight, not of such gravity as to leave the accused without representation. (5) That the failure to prosecute the first motion for new trial vigorously, or the inclination not to prosecute it at all, resulted from conscientious belief that no sufficient ground for a new trial existed (see Fambles v. State,

97 Ga. 625, 25 S. E. 625). (6) That appointed counsel, instead of attempting to discourage other counsel from prosecuting the motion, merely undertook to explain why they were withdrawing from the case. The evidence may have shown errors in judgment on the part of counsel, but did not demand the inference that they were unfaithful, or applied so little skill or diligence that the movant was actually deprived of a constitutional right. In Aldredge v. Williams, supra, it was said that "The attack upon one of the original appointees of the court because of his alleged conduct before the Governor in opposing clemency is irrelevant, since this relates to matters subsequent to and wholly disconnected with the trial, or the motion for new trial, or the former writ of error." Assuming now, however, that such conduct of the attorney as shown in the instant proceedings was relevant and material as tending to support the basic contention that the movant was in fact denied the benefit of counsel, yet under the evidence as a whole the trial judge was not bound to find that the attorney was guilty of infidelity at the time of the trial, or that he did not give substantial aid in the movant's defense. Several witnesses testified that both of appointed counsel were men of good professional and moral character, and that both were well skilled in their profession, one having been a member of the bar for about eight years, and the other for about two years, at the time of the trial.

In the present motion for new trial it was alleged that one of the attorneys testified before the Gov-

ernor that he would have prosecuted the motion for new trial if he had been paid a fee. On looking to the evidence we find that the statement of the attorney was "Had I been representing Williams and paid a fee for the purpose of gaining time, I would have prosecuted the motion." There is a material difference between the statements. Movant also complained that one of the attorneys actually signed a statement opposing clemency, and in his testimony before the Governor violated the confidence of his former client by quoting a statement by the latter tending to show guilt. If such or similar statements or matters could be taken as impeaching a verdict conclusively and as a matter of law, then it would be an easy matter for an attorney, after his client has been convicted, to talk away the verdict, if only some other attorney will file a motion for new trial and make proper complaint. We do not mean to intimate, however, that anything of this nature was attempted in the present case. As to personal appearance before the Governor, the evidence authorized the inference that the attorneys did not come voluntarily, but were invited to do so by the Governor because of contentions made in the application for clemency, regarding the manner in which they had conducted the trial. The hearing before the Governor apparently developed a little heat; and with respect to statements then made, the judge could have inferred that the attorneys were goaded to some extent by the charges against them. Even a husband and wife may fall out after living together a long time in harmony; and so with other relations, such as partners, friends, brothers. So, in view of all the

evidence heard and weighed by the trial judge, it can not be held by this court that statements made by the attorneys or either of them at the hearing before the Governor, including the alleged violation of confidence and plus even the previous recommendation of one of them in reference to clemency, established conclusively and as matter of law the contention of movant as to both or either of such attorneys that they were unfaithful to him during the trial, or that their services did not amount to aid or benefit of counsel, in a constitutional sense; but under the evidence as a whole the judge was authorized to find against such contention. And this is true in reference to such finding on the principal issue, regardless of whether the circumstances of the clemency hearing may have justified one of the attorneys in divulging to the Governor the former statement of the accused, and however improper the recommendation against clemency to his former client may have been. At most, these circumstances were merely evidential on the issue as to former conduct and attitude, and did not under all the evidence require a finding in movant's favor on that issue.

We have carefully examined the authorities cited by counsel for movant, and do not take issue with the general proposition that if appointed attorneys are so ignorant, negligent, or unfaithful that the accused was virtually unrepresented, or did not in any real or substantial sense have the aid of counsel, he would be deprived of a fundamental constitutional right, and if convicted might successfully complain that he had been denied due process of

law; but the evidence here did not demand a finding that such a state of facts existed with reference to movant; and the judge did not otherwise abuse his discretion in overruling the motion for new trial. This being true, the case does not come within the rulings in the cases cited by counsel for the plaintiff in error, some of them being: Downer v. Dunaway, 53 Fed. 2d, 586; Missouri v. Jones, 12 Mo. App. 93; People v. Schulman, 299 Ill. 125 (132 N. E. 530, 24 A. L. R. 1022, 1025, note); Sanchez v. State, 199 Ind. 235 (157 N. E. 1); Brown v. Mississippi, supra; Powell v. Alabama, 287 U. S. 45 (53 Sup. Ct. 55, 77 L. ed. 158, 84 A. L. R. 527); Johnson v. Zerbst, 304 U. S. 458 (58 Sup. Ct. 1019, 82 L. ed. 1461). See also Fambles v. State, 97 Ga. 625 (supra); Aycock v. State, 188 Ga. 550 (10), 567 (4 S. E. 2d, 221); North Dakota v. Keller, 57 N. D. 645 (223 N. W. 698, 64 A. L. R. 434, 436, note).

Judgment affirmed. All the Justices concur."

II. To the second question as presented by petitioner in taking the position that the Supreme Court of Georgia erred in affirming judgment of the Trial Court in dismissing the petition for habeas corpus, and in applying the rigid doctrine of res adjudicata without considering the petition on its merits, when it appeared that the previous habeas corpus action which was the basis of the plea of res adjudicata was not itself considered on its merits but was only considered on demurrer; respondent contends that the Supreme Court of Georgia correctly ruled in affirming the judgment of the Trial Court in dismissing the petition for habeas corpus, and sustain-

ed the plea of res adjudicata, for the reason that it was shown to the Court in the argument of counsel for respondent that the case had been heard on its merits in the extraordinary motion for a new trial, which fact was within the knowledge and breast of the Supreme Court itself, and is as set out in detail in question one. Attention of the Court is directed to the petition for a writ of certiorari filed to the October Term 1939 of this United States Supreme Court, in which the said petitioner filed a petition for a writ of certiorari to the ruling of the Supreme Court of Georgia entered on the 13th day of September, 1939, and modified and made a final judgment by said Court on the 16th day of November, 1939, overruling the judgment of the Fulton Superior Court of Atlanta, Georgia. Same being Case No. 587, which was filed December 13, 1939, in this Court. The identical questions that the petitioner is attempting to raise in the present petition for certiorari were presented in his petition for certiorari in Case No. 586 to the October Term 1939 of this Court. The Supreme Court of the United States in passing on petition in Case No. 586 filed to the October Term 1939 refused to entertain the petition. The Supreme Court of Georgia in Case No. 128,666, Aldredge, Sheriff, v. Williams, in the opinion by Justice Jenkins rendered September 13, 1939, held in effect:

> "A discharge under a writ of habeas corpus, after a conviction, cannot be granted unless the judgment is absolutely void; as where the convicting court was without jurisdiction, or

where the defendant in his trial was denied due process of law, in violation of the Federal fourteenth amendment (Code, Section 1-815) and the State constitution, article 1, section 1, paragraph 5 (Code, 2-105)."

The Supreme Court in the same decision in discussing as to what constitutes a denial of counsel, in violation of article 1, section 1, paragraph 5 of the Georgia Constitution (Code, Section 2-105), and whether and when such a denial may constitute also a violation of the Federal Fourteenth Amendment as to due process, and whether and when this would render the judgment void, so as to be asserted in a petition for habeas corpus, cited Johnson v. Zerbst, 304 U. S. 458, 467 and cases cited. This decision in detail is set forth as follows:

"IN SUPREME COURT OF GEORGIA

No. 12966

ALDREDGE, SHERIFF,

V.

WILLIAMS

OPINION—September 13, 1939

By the Court:

Jenkins, Justice:

"1. A discharge under a writ of habeas corpus, after a conviction, cannot be granted unless the judgment is absolutely void; as where the convicting court was without juris-

diction, or where the defendant in his trial was denied due process of law in violation of the Federal fourteenth amendment (Code, Section 1-815) and the State constitution, article 1, section 1, paragraph 5 (Code, 2-105). Since the writ cannot be used merely as a substitute for a writ of error or other remedial procedure to correct errors of law, of which the defendant had opportunity to avail himself, no question as to guilt or innocence or as to any irregularity can be so raised, unless it was such as to render the judgment wholly void. Moore v. Dempsey, 261 U. S. 86 (43 Sup. Ct. 265, 67 L. ed. 543); Frank v. Mangum, 237 U. S. 309 (35 Sup. Ct. 582, 59 L. ed. 969); In re Wood, 140 U.S. 278, 11 Sup. Ct. 738, 35 L. ed. 505); Nielsen, petr., 131 U.S. 176 (9 Sup. Ct. 672, 33 L. ed. 118); Downer v. Dunaway, 53 Fed. 2d, 586; In re Terrill, 144 Fed. 616, 618; McFarland v. Donaldson, 115 Ga. 567, 568 (41 S.E. 1000); Etheridge v. Poston, 176 Ga. 388 (5) (168 S.E. 25); Blackstone v. Nelson, 151 Ga. 706 (108 S.E. 114); Strickland v. Thompson, 155 Ga. 125 (1, 3, 4), 126 (116 S.E. 593); Davis v. Smith, 7 Ga. App. 192 (5) (66 S.E. 401); Cross v. Foote, 17 Ga. App. 802 (88 S.E. 594). As to what constitutes a denial of counsel, in violation of art. 1, sec. 1, par. 5, of the Georgia constitution (Code, section 2-105), whether and when such a denial may constitute also a violation of the Federal fourteenth amendment as to due process (Code, (fol. 146) section 1-185), and whether and when this would render the judgment void, so as to be asserted in a petition for habeas corpus, see Johnson v. Zerbst, 304 U.S. 458, 467 (58 Sup.

Ct. 1019, 82 L. ed. 1461); In re Swan, 150 U.S. 637, 648 (14 Sup. Ct. 225, 37 L. ed. 1207); Powell v. Ala., 287 U.S. 45, 60 (53 Sup. Ct. 55, 77 L. ed. 158); Nielsen, supra; In re Wood, supra; In re Morgan, 203 U.S. 96 (27 Sup. Ct. 25, 51 L. ed. 105); In re McCluskey, 40 Fed. 71; Wells v. Pridgen, 154 Ga. 397, 399 (114 S.E. 355), and cit.; Delk v. State, 99 Ga. 667, 671 (26 S.E. 752); Charlton v. State, 106 Ga. 400 (32 S.E. 347); Fleming v. Lowry, 173 Ga. 894 (1, 4) (162 S.E. 144); Sanders v. Paschal, 186 Ga. 837 (199 S.E. 153); Peebles v. Mangum, 142 Ga. 699 (83 S.E. 522); Stephens v. Henderson, 120 Ga. 218, 220 (47 S. E. 498); Frank v. State, 142 Ga. 741 (83 S.E. 645, L.R.A. 1915D, 817); State v. Dunn, 159 N.C. 470; Fambles v. State, 97 Ga. 625, 628 (25 S.E. 625).

"2. No failure to afford to the instant petitioner the benefit of counsel, or other due process in his trial and conviction for murder, appears, the petition, the attached record of the former proceedings, and the decision of this court on the writ of error therefrom (Williams v. State, 186 Ga. 251, 261, 197 S.E. 838), show that the trial court appointed two attorneys to represent the defendant, that his witnesses were subpoenaed, present in court, and consulted by his counsel. Although it is now alleged that he was denied due process, because his attorneys did not move for a continuance and obtain a longer time to prepare the case, because they allowed irrelevant or otherwise illegal evidence to be admitted without objection, because they relied solely on the statement of the defendant to the jury without introducing testimony, and because they

themselves did not actively pursue the motion for a new trial,—these were not matters which would constitute a denial of the right to due process, but at most would amount to alleged negligence (fol. 147) or errors of judgment. With respect to the reliance solely on the statement of the defendant, judicial notice is taken of the common practice of attorneys to obtain thereby the advantage of having the opening and concluding argument to the jury, under the Code, Section 27-2201. Farrow v. State, 48 Ga. 30 (3), 36. If the appointed attorneys did not have sufficient time to prepare the case, and they were derelict in failing to move for a continuance, or otherwise neglectful during the trial, these questions could have been presented to the trial court and to this court by motion for new trial, or extraordinary motion for new trial if necessary and proper. The record and the former decision in this trial and conviction for murder show that this defendant actually employed and obtained new counsel, and that they prepared and prosecuted an amended motion for new trial and the former writ of error to this court from its denial; that the questions now raised for the first time in the present writ of habeas corpus, filed by still additional counsel, could have been raised in the motion, but were not so presented; and that no attack is now made upon counsel who represented the defendant in such motion. See Delk v. State, supra; Charlton v. State, 106 Ga. 400 (32 S.E. 347). No question arises, and it is therefore not decided, as to whether a petition for habeas corpus would lie on the ground that the defendant, as alleged, was deprived of the benefit of counsel in the trial, if he had not received the benefit of

other counsel with opportunity to raise all questions in his motion for new trial. The attack upon one of the original appointees of the court because of his alleged conduct before the Governor in opposing clemency is irrelevant, since this relates to matters subsequent to and wholly disconnected with the trial, or the motion for new trial, or the former writ of error.

"3. Under the foregoing rulings, the superior court erred (fol. 148) in overruling the demurrer and the motion of the sheriff to quash the application for the writ. Smith v. Milton, 149 Ga. 28 (98 S.E. 607).

"Judgment reversed. All the Justices concur."

STATEMENT OF FACTS.

For the information of the Court a history of this case is given in detail. The petitioner Williams was indicted in the September Term of 1937 of the Superior Court of Elbert County for the offense of murder in that it was alleged that he killed Lon Fortson by shooting him with a pistol on July 19, 1937. On the morning of September 13, 1937, two attorneys of the Elberton bar were appointed to represent the accused, he being unable to employ counsel. On Thursday afternoon, September 16, his trial began and continued until Saturday afternoon following when the case was submitted to the jury. The following Monday morning the jury returned a verdict finding defendant guilty of murder as

charged. The verdict carried no recommendation and the sentence of death was imposed. Appointed counsel filed a motion for a new trial but later withdrew from the case after another attorney was employed. The employed attorney prepared an amendment to the motion for a new trial and prosecuted it to a final determination and the judgment overruling the motion was affirmed by the Supreme Court. See Williams v. State, 186 Ga. 251. After defendant was resentenced the same employed attorney filed a motion to set aside the new sentence because of alleged disqualification of the presiding judge and for other reasons not relating to the verdict. This motion was overruled and again judgment was affirmed by the Supreme Court of Georgia. See Williams v. The State, 187 Ga. 415. Later the present attorneys were employed and they instituted in behalf of the petitioner and against the Sheriff of Fulton County, where the defendant was then incarcerated in jail, a petition for a writ of habeas corpus alleging that the conviction was void for the reason that the accused had been denied benefit of counsel and due process. The State filed a demurrer to the petition for habeas corpus which was overruled by the trial judge and in response the Sheriff excepted and this judgment was reversed by the Supreme Court of Georgia. See Aldredge v. Williams, 188 Ga. 607. Then on March 11, 1940, during the March term of the Superior Court of Elbert County, through the same attorneys who had represented him in the habeas corpus case, and after a writ of certiorari to the Supreme Court of the United States had been denied, presented to the Judge of the Elbert

Superior Court an extraordinary motion for a new trial in which he gave a history of the case and referred to all foregoing decisions and raised the identical questions, both as to issue of fact and as to law, that he is now attempting to raise. The trial judge allowed the petitioner's attorney on this extraordinary motion to present affidavits setting up the same issues of fact that they are attempting to raise in this procedure and the trial judge heard the case. The extraordinary motion for a new trial was not dismissed nor otherwise disposed of on inspection of its allegations, but on the contrary the trial judge entertained for the purpose of investigating the facts, and after hearing evidence on both sides passed an order finding the issues of fact in favor of the respondent and denying the motion. Thus it would appear that even if the allegations should be treated as an absolute cause for a new trial for the reason that movant was denied benefit of counsel and due process or for other reasons, the judge accepted the responsibility as a trior of the facts, and his findings thereon as supported by substantial evidence is conclusive. The evidence for the movant in the extraordinary motion for a new trial including certain affidavits, one from himself, three from persons who depose to circumstances tending to show self-defense, one from the attorney who had been appointed as legal counsel, also letters and excerpts from testimony given by the appointed attorney in a clemency hearing before the Governor; and the evidence for the respondent included affidavits from various officers and jurors, and other excerpts from evidence of the attorney as delivered in said clemency hearing and other documents,

and all of such evidence was admitted without objection, and the order denying the motion expressly recited that the issues of facts are found against movant and in favor of respondent.

DISCUSSING—CONTRADISTINCTION OF CASES AS CITED BY PETITIONER.

Counsel for petitioner in this case contended that the case of Powell v. Alabama, 287 U. S. 45, is direct authority for the purpose for which petitioner here contends, and is controlling in this case.

The Powell case is the celebrated Scottsboro case of Alabama, and what was decided by the Supreme Court in that case was:

> "2. The right of persons charged with crime to be represented by counsel at their trial is in substance denied where on being arraigned they were not asked whether they had or were able to employ counsel, or wished to have counsel appointed, or whether they had friends or relatives who might assist in that regard if communicated with, and until the morning of the trial no lawyer had been named or definitely designated to represent them, the court having at the time of their arraignment merely charged 'all the members of the bar' to represent them."

In the Powell case two questions were raised as to violation of due process of law. One was the right of the accused to the assistance of counsel and where it appeared that no specific counsel had

been assigned by the court, which, at the time of the defendant's arraignment, had merely charged all the members of the bar to represent the petitioner. Also it appeared in the Powell case that insufficient time had been assigned to counsel to prepare the case, and that there was a failure of reasonable time and opportunity to secure counsel prior to the trial, and that a right to a hearing as a basic element of due process includes the right to the aid of counsel; and that it was the duty of the court, whether requested or not, to assign counsel for the defendant as a necessary requisite of due process of law, and that the duty is not discharged by an assignment at such a time, or under such circumstances, as to preclude the giving of effective aid in the preparation and trial of the case.

In the case at bar no such facts appear. Capable and competent attorneys were appointed three days before the trial. Neither did the defendant nor his counsel ask for a continuance or make even a suggestion at the trial that they had not had time to prepare the defendant's defense.

Counsel for petitioner also relied upon the case of Johnson v. Zerbst, 304 U. S. 458. An examination of this case discloses that upon the undisputed facts the failure of the court to assign counsel for petitioner in the trial of his case deprived him of his constitutional rights under the Sixth amendment, and that the case was decided more on the point of whether or not the petitioner had made a waiver of this constitutional right. The District Court did not so find. No such facts appear in the

case at bar because there was an assignment of counsel, and there was no question as to whether or not he had waived the right to counsel. This case is easily distinguishable on its facts.

A reading of the case cited by petitioner of Glasser v. U. S. reported in Supreme Court, L. ed. Advance Opinions, Volume 86, page 406, 7th headnote, discloses that the defendant in a criminal case is unconstitutionally deprived of assistance of counsel by court order made after he had objected to the proposed action requiring his counsel also to represent a co-defendant, particularly where the interest of the co-defendant was conflicting with his own. Justice Frankfurter in writing the opinion states:

> "It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record."

Not until twenty weeks after the attorney of Glasser had become counsel for the co-defendant and fifteen weeks after trial had ended did Glasser discover that he had been deprived of his constitutional rights. This was obviously a lawyer's afterthought. It does not promote respect for the Bill of Rights to turn such an afterthought into an imaginary injury that is reflected nowhere in the contemporaneous record of the trial and make it the basis for reversal.

No such issue was made, nor are there any such facts in the case at bar.

Counsel for petitioner cites the case of Minn. v. Brundage, 180 U. S. 499, which in effect held:

> "Except in cases of emergency, such as are above defined, the applicant should be required to exhaust such remedies as the State gives to test the question of the legality, under the Constitution of the United States, of his detention in custody."

Evidently the Supreme Court of the United States had this decision in mind when they denied a petition for writ of certiorari previously filed by the petitioner in this case, for acting on that suggestion the same counsel of petitioner then filed in the State Court the extraordinary motion for a new trial before the trial judge of the Elbert County Superior Court, in which extraordinary motion for a new trial they raised every issue that they are attempting to raise here. And the trial judge after hearing all of the facts denied the extraordinary motion for a new trial, and the case was carried to the Supreme Court of Georgia, where the judgment of the trial court was affirmed.

The decision cited by counsel for petitioner of Salinger v. Loisel, 265 U. S. 230, and the case of Wong Doo v. United States, 265 U. S. 239, that the strict doctrine of res adjudicata does not apply to habeas corpus cases, and that more than one application can be made to the court. An examination of both cases cited by counsel for petitioner

shows that they are not in point. On page 231 of the Salinger case the Court said:

> "A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and" (and the petitioner has had five hearings on review) "(b) a prior refusal to discharge on a like application." (And petitioner has had such like application before Superior Court of Fulton County and had a decision of Fulton Superior Court reviewed and has attempted a certiorari to this Court from the decision of the Supreme Court of Georgia.)

On the same page the Court said:

> "The decision in the Cuddy case was on a second application, and was given by Mr. Justice Field. While holding the doctrine of res adjudicata inapplicable, he said, 'the officers before whom the second application is made **may take into consideration the fact that a previous application has been made to another officer and refused; and in some instances that fact may justify a refusal of the second.**"

In the Wong Doo case the second headnote is as follows:

"But the court, in its sound discretion, may dismiss a petition for habeas corpus because of a prior refusal, when the ground for the second application was set up, with another, in the first, and when the evidence to support it then was withheld without excuse for use on a second attempt if the first failed."

HABEAS CORPUS IMPROPER REMEDY

1. A judgment of a court of competent jurisdiction can not be attacked by habeas corpus save only when it is absolutely void.

Smith v. Milton, 149 Ga. 28;

Anderson v. Treat, 172 U.S. 24, 19 Sup. Ct. 67;

In re: Swann, 150 U.S. 637, 14 Sup. Ct. 225, 37 L. ed. 1207;

Ethridge v. Boston, 176 Ga. 388.

2. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction of a case properly subject to its cognizance, can not be reviewed by habeas corpus, since this writ may not be employed as a substitute for a writ of error or other remedial procedure to correct errors occuring on the trial.

Leo M. Frank v. C. Wheeler Mangum, Respondent, 237 U. S. 308, 59 L. ed. 969.

3. Due process of law implies administration of laws which apply equally to all persons according

to established rules; and which are not violative of the fundamental principles of private rights, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. Consequently where one indicted for murder has had full opportunity under the constitution and laws of the state to defend his case in the courts of the state having jurisdiction thereof in person, by attorney, or both, according to established constitutional rules of procedure he has been afforded due process of law under state and federal constitutions and where such opportunity has been afforded without discrimination one charged with crime has been accorded the equal protection of the law.

Frank v. State, 142 Ga. 741.

In the case at bar both petitions for habeas corpus, the first one filed in the Superior Court in Fulton County and denied, and the second one filed in the City Court of Reidsville and denied, are identical in every respect. In all cases where petition for habeas corpus was granted and sustained under the doctrine that more than one petition for habeas corpus could be filed, an examination of the facts will disclose that almost in every instance there was no review of the case by the appellate court or the trial court and it will also disclose on examination of the facts that the first application had been previously denied by the Court. To sustain the above contention counsel for respondent cites the case In re Swan, Petitioner, 150 U.S. 648,

where Chief Justice Fuller in delivering the opinion of the Court said:

> "We reiterate what has so often been said before, that the writ of habeas corpus cannot be used to perform the office of a writ of error or appeal; but when no writ of error or appeal will lie, if a petitioner is imprisoned under a judgment of the Circuit Court which had no jurisdiction of the person or of the subject-matter, or authority to render the judgment complained of, then relief may be accorded."

FAILURE OF DEFENDANT'S COUNSEL TO PRESENT WITNESSES.

Reliance on defendant's statement rather than evidence of witnesses and the defendant's statement is to be determined in its last analysis by counsel present and engaged in the trial of a given case. Code of Georgia, Section 27-2201:

> "After the testimony shall have been closed on both sides, the State's counsel shall open and conclude the argument to the jury, except that, if the defendant shall introduce no testimony, his counsel shall open and conclude after the testimony on the part of the State is closed."

The record in this case shows that all the witnesses of petitioner which it is claimed the appointed attorneys failed to use as witnesses in petitioner's behalf on the trial of the case were actually present in court, conferred with before, at and during the trial by the petitioner and petition-

er's attorneys appointed by the Court. It is certainly to be presumed that it was the legitimate opinion of these attorneys that petitioner's interest would be better served by relying upon his statement only, and thereby securing the opening and concluding argument before the jury rather than sacrificing this valuable right by offering witnesses.

Furthermore the failure of counsel to object to testimony is not itself of sufficient reason to hold that one has been denied due process of law. This too is largely a matter of discretion to be determined by counsel on the trial of the given case. It is for them to determine while the trial is in progress whether or not it will be profitable to interpose an objection to testimony claimed to be inadmissible. However, as to this, it is urged that even though the counsel appointed by the court should have interposed objections to the testimony alleged to have been prejudicial in character, petitioner sustained the loss of no constitutional rights, especially so, since counsel employed by him, A. S. Johnson, could have incorporated in his amendment to the original motion for a new trial an assignment of error based thereon, even though the record discloses no objection based thereon. Such an assignment of error would have at least constituted one of the discretionary grounds of motion for a new trial provided by Section 70-208 of the Code of Georgia. Such procedure on the part of Attorney Johnson would have given petitioner the full benefit of due process of law and would have given the courts of this State an opportunity

to have corrected any error that might have been shown to exist in the trial court. A failure to object to alleged prejudicial testimony when coupled with the opportunity petitioner had through Counsel A. S. Johnson, employed by him, to raise the question by way of an amendment to original motion is not a denial of due process of law, and is not of such character as to render petitioner's conviction void. Section 70-208, Title 70, of the Code of Georgia in addition to statutory grounds confers authority on trial courts to grant new trials on "discretionary grounds." The Code Section is as follows:

> "And all applications for a new trial on other grounds, not provided for in this code, the presiding judge must exercise a sound legal discretion in granting or refusing the same according to the provision of common law and practice of the courts."

In addition to this section, under Section 70-303, Title 70, of the Georgia Code, provision is made for filing for extraordinary moton for new trial.

CONCLUSION

In all of the cases where Federal courts have assumed jurisdiction by writ of habeas corpus, it was made to appear that the defendant on trial was surrounded by peculiar circumstances such as aroused public indignation growing out of the nature of the crime alleged to have been committed; the presence of intense mob spirit and of actual mobs and mob violence, the necessity for the pro-

tection of the defendant by its State militia while the trial was being conducted, by reason of which circumstances the Federal courts held that the trial court, though existing in form did not exist in substance and, therefore, lost jurisdiction of the case. None of these elements existed either before, at or after the trial of the petitioner, Williams. His trial was a perfectly normal trial, held in perfectly normal manner under State court procedure, and therefore the Superior Court of Elbert County had jurisdiction over the case, and no reason is shown by petitioner in the present habeas corpus proceedings why the judgment rendered therein is void.

No merit appears in any of the grounds on which the judgment of the Supreme Court of Georgia is attacked and we therefore respectfully submit that the certiorari should be denied.

Respectfully submitted,

ELLIS ARNALL,
Attorney General,
State of Georgia.

E. L. REAGAN,
Assistant Attorney
General, State of
Georgia.

R. HOWARD GORDON,
Solicitor General,
Northern Judicial
Circuit for Georgia,
Counsel for
Respondent.

I, E. L. Reagan, Assistant Attorney General, State of Georgia, do certify that I have this day served William S. Shelfer, of counsel for the petitioner, with a copy of the within response and brief of the respondent, this 4th day of March, 1942.

E. L. REAGAN.